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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GREGORY HOUSTON,

Petitioner

vs.

DALE FOLTZ, Warden, State Prison
of Southern Michigan,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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44 pp

QUESTIONS PRESENTED

Petitioner Gregory Houston was tried in state court for murder and convicted. Habeas corpus was denied in federal court. The questions presented are:

1. WHERE THE STATE TRIAL COURT EXCLUDED TESTIMONY THAT THE KILLING WAS COMMITTED BY SOMEONE ELSE,

WAS THERE A DENIAL OF DUE PROCESS OF LAW COGNIZABLE IN FEDERAL HABEAS CORPUS, OR DOES FEDERAL HABEAS CORPUS NOT COVER "STATE COURT RULINGS ON THE ADMISSIBILITY OF EVIDENCE"?

2. WHERE THE STATE TRIAL COURT EXCLUDED ON THE GROUND OF HEARSAY TESTIMONY THAT THE DEFENDANT WAS INNOCENT, AND WHERE SIMILAR EVIDENCE IS ROUTINELY HELD RELIABLE AND ADMISSIBLE BY THE STATE COURTS WHEN IT SHOWS THE DEFENDANT TO BE GUILTY,

DOES THIS UNEQUAL RIGHT TO PRESENT EVIDENCE GIVE THE PROSECUTOR AN UNFAIR PROCEDURAL ADVANTAGE OVER CRIMINAL DEFENDANTS CONTRARY TO DUE PROCESS UNDER THE PRINCIPLES OF WARDIUS v. OREGON, 412 U.S. 470; 93 S.Ct. 2208; 37 L.Ed.2d 82 (1973)?

3. WHERE THE STATE APPEALS COURT REVERSED THE CONVICTION OF A JOINTLY TRIED CODEFENDANT FOR THE PROSECUTOR'S DISCOVERY VIOLATIONS,

DO DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT THE STATE GIVE THE SAME RELIEF TO THE PETITIONER?

4. WHERE PETITIONER WAS KEPT OFF THE WITNESS STAND BY HIS ATTORNEY'S FAILURE TO MAKE A MOTION TO SUPPRESS HIS PRIOR CONVICTIONS, AND WHERE THE STATE COURT REFUSED TO HOLD AN EVIDENTIARY HEARING,

DID THE ATTORNEY'S FAILURE CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL, AND CAN THE DISTRICT COURT PROPERLY DECIDE THE QUESTION WITHOUT AN EVIDENTIARY HEARING?

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OCTOBER TERM, 1987

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Petitioner

vs.

DALE FOLTZ, Warden, State Prison
of Southern Michigan,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY HOUSTON, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued July 11, 1988.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of July 11, 1988 is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan of May 29, 1987 is attached as Appendix B.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit was entered July 11, 1988. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner Gregory Houston was jury tried in Detroit Recorders Court before the Hon. Michael J. Connor. He was convicted of first degree murder in the stabbing death of Kevin White. M.C.L. 750.316. He was also convicted of assault with intent to murder Terrence Silver. M.C.L. 750.83. On February 10, 1977, Judge Connor sentenced Petitioner to two concurrent terms of life in prison.

Petitioner Houston was jointly tried with codefendant Michael King on a charge of murder. King was convicted of manslaughter in the death of Kevin White, later reversed in People v. King, 98 Mich. App. 146 (1980). Houston, King, Raleigh Lewis, and Eddie Gavin were jointly tried and convicted of assault with intent to do great bodily harm upon Terrence Silver at the same trial.

Officer James Kelly testified that while driving by East Jefferson and Concord in Detroit on normal patrol he was flagged down by a black female. (T 686). She appeared to be excited. (T 690). During cross-examination, Petitioner's counsel, Mr. Friedman, attempted to introduce what the woman told the officer. (T 690). An objection by the prosecutor and by counsel for a codefendant was sustained by the court, and the evidence was not heard by the jury. (T 690).

Outside the presence of the jury, Officer Kelly explained what had happened (T 692-693):

"THE COURT: What exactly did she tell you?

THE WITNESS: She told me that a man had been stabbed and he was lying on Jefferson there which was probably 100, 200 yards away, and the man who did the stabbing was running north on Concord, and we were sitting on Concord and Jefferson and we observed a black male running north on Concord.

THE COURT: Did she say anything else to you?

THE WITNESS: Well, the man has been stabbed, he is over there, and the guy who did it, he is running up the street.

THE COURT: All right. And that is everything she told you?

THE WITNESS: To my recollection, yes, sir.

THE COURT: You didn't get her name at that time?

THE WITNESS: No, sir, because we were trying to apprehend whoever did it.

THE COURT: All right. Could you see a man running?

THE WITNESS: Yes, sir.

THE COURT: And that was the man you subsequently arrested?

THE WITNESS: Yes, sir.

THE COURT: And you want that in?

MR. FRIEDMAN: Yes, I do."

The man whom the officer followed and arrested, and who was pointed out by the bystander, was Eddie Gavin. (T 687-688). This evidence was not admitted before the jury.

Witness Terrence Silver, alone among the witnesses, testified that Gregory Houston committed the stabbing. (T 241). Terrence Silver, alone among the witnesses, testified that Mr. Houston declared "I have been waiting to do this for a long time." (T 244). Based on the testimony of Silver, Petitioner Houston was convicted of premeditated murder.

Terrence Silver was originally charged with the murder. (T 300). He was released after implicating Petitioner Houston. Mr. Silver was later convicted in another case and is now serving a life sentence for murder in the Michigan prison system.

Petitioner did not testify. Petitioner did not make any statements claiming self-defense. Petitioner did not make any statements admitting guilt, apart from the claim of Silver that Petitioner committed the stabbing and said "I have been waiting to do this for a long time." (T 244).)

The prosecutor did not provide certain statements of Terrence Silver to defense counsel before trial as ordered by the Court. The judge ruled that the failure to turn the statements over was deliberate misconduct of pretrial prosecutor House. (T 443). This was the basis for the reversal of the convictions of codefendant Michael King.

At a post-trial hearing, Petitioner submitted an affidavit that his trial counsel, Mr. Friedman, told him not to testify because his prior record would be used against him. No motion to suppress the prior record was made. Petitioner deposes that he would have testified but for the faulty advice of his counsel.

REASONS FOR GRANTING THE WRIT

Questions 1 and 2: Exclusion of evidence that the Petitioner is innocent, where similar evidence is routinely held reliable and admissible when it is evidence of guilt.

Petitioner Gregory Houston was convicted of first degree murder in state court based on the testimony of a single witness, Terrence Silver, that it was Houston who committed the killing. The trial judge excluded testimony proffered by the defense that the killer was Eddie Gavin. Petitioner, who had a criminal record, did not testify.

When the police arrived at the scene of the crime, a small crowd had gathered, and a woman in the crowd pointed to a man as the one who did the stabbing. The police chased and apprehended the man, who turned out to be Eddie Gavin. Counsel moved to have this testimony admitted as evidence that Gregory Houston was not the one to stab the deceased. The trial judge excluded the evidence as hearsay. (T 686-693).

A Petition for Writ of Habeas Corpus claimed that the exclusion of the testimony denied due process of law. U.S. District Judge Pratt and the U.S. Court of Appeals for the Sixth Circuit denied habeas

corpus relief, finding no federal issue in the exclusion of evidence that the accused is innocent. The Sixth Circuit ruled that "habeas review does not ordinarily extend to state court rulings on the admissibility of evidence." (Appendix, A-4).

The Sixth Circuit ruling conflicts with the principles stated in Chambers v. Mississippi, 410 U.S. 284, 302; 93 S.Ct. 1038; 35 L Ed 2d 297 (1973). In Chambers and other cases such as Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979) and Hill v. Rose, 579 F. Supp. 1080 (M.D. Tenn. 1983), the Courts have held that in any criminal case the defendant has a due process right, U.S. Const., Amend. XIV, to introduce evidence that the actions the prosecution claims were committed by him were in fact committed by another person.

The principle of Chambers that the Sixth Circuit refused to apply or recognize was upheld recently in a 5-4 decision in Rock v. Arkansas, 483 U.S. ___; 107 S.Ct. ___; 97 L.Ed.2d 37, 48-49 (1987):

> "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In Chambers v. Mississippi [cite] the Court invalidated a

> State's hearsay rule on the ground that it abridged the defendant's right to 'present witnesses in his own defense.' ...
>
> In the Court's view, the State in Chambers did not demonstrate that the hearsay testimony in that case, which bore 'assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony.

Instead of following the precedent of Chambers and Rock, the Sixth Circuit cited a previous case, Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985) holding that due process is not implicated in the exclusion of testimony favorable to the defendant. It appears that rejection of Chambers and Rock is firmly established in Sixth Circuit jurisprudence. Action by this Court would be helpful in reestablishing that exclusion of evidence that the crime was committed by someone else implicates the values found in the Due Process Clause.

In Chambers, cited with approval in Rock, the Court held that hearsay rules cannot be applied mechanistically to exclude reliable hearsay evidence that the defendant is innocent.

Because the vote in Rock was 5-4, and because the excluded evidence in this case is substantially

more reliable than the evidence excluded in Rock, granting of Certiorari may help the Court arrive at a consensus that will help develop the law more stably than would a 5-4 decision such as that in Rock.

Under Michigan jurisprudence, the statement of a bystander pointing out the guilty party to arriving police is routinely considered by Michigan courts to be sufficiently reliable to be admitted when it is evidence of guilt; People v. Todaro, 253 Mich. 367 (1931), aff'd. on rehearing 256 Mich. 427 (1932); People v. Frank Johnson, 58 Mich. App. 1 (1975); it is therefore sufficiently reliable to be admitted when it is evidence of innocence.

In People v. Todaro, the Court held that the statement of the bystander was sufficiently reliable to constitute proof beyond a reasonable doubt of guilt, where there was no other evidence of guilt in the case. Evidence that is sufficiently reliable to prove guilt beyond a reasonable doubt when it points at the defendant is sufficient to raise a reasonable doubt when it points away from the defendant.

In People v. Todaro, supra, there was a robbery at a combination cabaret and house of prostitution, and the police were called. When the police arrived, an unidentified patron of the establishment pointed out defendant Todaro as one of the robbers. The Michigan Supreme Court held that although the person who declared Todaro was one of

the robbers was unknown and not presented as a witness, the statement was an excited utterance and part of the res gestae. The Court held it was admissible even though hearsay. The Court held the hearsay statement sufficient evidence of guilt.

A similar ruling was made in People v. Frank Johnson, supra. While police were combing an area looking for a purse-snatcher, a bystander pointed out Mr. Johnson as the guilty party. Although the bystander was not called as a witness, the Michigan Court of Appeals held that it was proper to use the bystander's statement.

If such testimony is admissible when it helps the prosecution, it must also be admissible when it helps the defense. To hold otherwise is to grant the prosecution a non-reciprocal evidentiary benefit, which denies due process of law. Wardius v. Oregon, 412 U.S. 470; 93 S.Ct. 2208; 37 L.Ed.2d 82 (1973).

The Sixth Circuit declined to address the Wardius v. Oregon claim. This Court has not analyzed the Wardius principles in quite some time. If the principles of Wardius are not to become moribund they should be reexamined by this Court, especially now that 15 years have passed since Wardius.

In Chambers, supra, 295, the Supreme Court held that the right to confront and cross-examine adverse witnesses is not absolute:

> "but its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined."

See also Rock, 97 L.Ed.2d at 49.

In this case, the "competing interest" which was permitted to override Petitioner's right to prove his innocence is the interest of the state in cross-examining the ultimate source of the evidence: the declarant. That interest is a real one, but carries minimal weight when the statement is an on-the-scene statement of a bystander identifying the perpetrator of a crime. The right to introduce such hearsay testimony has repeatedly been held to outweigh the opposing party's interest in cross-examining the declarant. People v. Todaro, supra; People v. Frank Johnson, supra.

In contrast, the interest of the Petitioner is the right to prove that someone else committed the crime. The courts consistently hold that to be the most fundamental of rights, and the one that most directly involves the integrity of the fact-finding process. Chambers v. Mississippi, supra; Pettijohn v. Hall, supra; Hill v. Rose, supra.

In Delaware v. Van Arsdell, 475 U.S. ___; 106 S.Ct. ___; 89 L.Ed.2d 674 (1986), Justice Rehnquist, speaking for the majority, stated:

> "that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."

The only evidence that Petitioner stabbed Kevin White was that Terrence Silver said so. Silver's testimony was very friendly to Eddie Gavin, giving him little or no role in the fight. Under the circumstances of this case, a reasonable juror might well conclude that a bystander blaming Eddie Gavin would be more reliable than Mr. Silver exonerating him. They needed to hear the statement to reliably decide "the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdell, supra.

Excluding evidence that the crime was committed by someone else was held to be a violation of due process in Chambers v. Mississippi, supra, and detrimentally impacts on "the central purpose of a criminal trial" as defined in Delaware v. Van Arsdell. In light of that, the Court should grant Certiorari and find a denial of due process.

Question 3: Denying relief to Petitioner, where the case of a codefendant was reversed for discovery violations.

In People v. King, 98 Mich. App. 146 (1980), the Michigan Court of Appeals reversed the

convictions of Michael King, who was jointly tried with Petitioner Houston. It was alleged that King held a shotgun while Petitioner Houston committed the stabbing. The prosecutor withheld pretrial statements of witness Terrence Silver until the middle of trial. All 3 state Court of Appeals judges agreed that the prosecutor's violation of a discovery order required reversal for King. However, a different 3 judge panel refused to reverse the conviction of the identically situated Petitioner Houston. The federal issue is whether the State can refuse Houston the same relief that was given to King, under the Due Process Clause and Equal Protection Clause, U.S. Const., Amend. XIV.

Counsel is unfamiliar with any U.S. Supreme Court cases dealing with the precise question of whether relief granted to one defendant can be denied to a codefendant simply because the deciding judges were different. Nevertheless, the federal question is real and worthy of decision.

Equal protection is offended when people are afforded different treatment under the law without appropriate justification. Baxstrom v. Herold, 383 U.S. 107; 86 S.Ct 760; 15 L.Ed.2d 620 (1966).

If a state court system arbitrarily withholds the benefit of a state rule of law from a criminal defendant, due process of law is denied. If a state court system treats similarly situated criminal

defendants differently, equal protection of the law is denied. U.S. Const., Amend. XIV. See Hicks v. Oklahoma, 447 U.S. 343; 100 S.Ct. 2227; 65 L.Ed.2d 175 (1980); Jones v. Russell, 299 F. Supp. 970 (E.D. Tenn. 1968); Braley v. Gladden, 403 F.2d 858 (9th Cir. 1968); Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981).

The testimony of witness Silver comprised over half of the prosecution case. (258 pages out of 520). He gave positive testimony, the only testimony, that it was Petitioner Houston who actually committed the stabbing. He gave the only testimony that Petitioner Houston stated that the killing was a planned one. If this testimony had been disbelieved or impeached Mr. Houston might well not have been convicted of first degree murder or the other charge. Witness Silver's testimony was important in the case against Michael King; it was equally important in the case against Gregory Houston.

At the preliminary examination, Terrence Silver discussed a confrontation he had had with Vincent Hollis. (PT 8). Silver testified that Vincent Hollis was one of the people involved in the instant fight, and kicked Silver while Silver was laying on the ground. (PT 14, 25). The withheld statement was a pretrial statement of Silver that Vincent Hollis was not there and not involved at all. (T 442-443). If Silver could make up a lie about Hollis, he surely

could make up other lies.

Under Michigan procedure the defense was entitled to this statement before trial. [Federal procedure permits withholding such statements until trial. F.R.Cr.P. 16(a)(2).] In Michigan, a defendant is not only entitled to witness statements before trial, People v. Dellabonda, 265 Mich. 486 (1933), but is entitled to them before the preliminary examination as well, in order for counsel to properly prepare for his client's defense. People v. Bellanca, 386 Mich. 708 (1972). Judge Michael Connor (the trial judge, but not the judge on the post-trial motions) stated on the record that the failure to turn over the statement was deliberate misconduct of pretrial prosecutor House, and declared that he would send the matter to the Attorney Grievance Commission. (T 443).

In People v. King, the codefendant's case, the Court held:

> "When a prosecutor has suppressed pretrial statements that contradict statements made at trial and which would have been material to trial preparation, nondisclosure must be considered prejudicial."

Equal protection and due process require that this rule of law be applied to Petitioner Houston as well as his codefendant King. Because the facts of

suppression and contradiction are the same, and because the credibility of witness Silver was of equal importance to both Houston and King, "nondisclosure must be considered prejudicial."

For the state court system to apply this rule to King and not to the similarly situated Houston denies due process and equal protection of the laws. For this reason, Petitioner Houston should be ordered released unless the state courts give him a new trial just as they gave Mr. King.

Question 4: Ineffective assistance of counsel from failing to move to suppress a prior conviction, thereby keeping Petitioner off the witness stand.

A criminal defendant is entitled to the effective assistance of counsel at trial. Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759; 90 S.Ct. 1441; 25 L.Ed.2d 763 (1970); U.S. Const., Amends. VI, XIV.

If the attorney makes a serious mistake which could affect the verdict, reversal is required even if the attorney was generally competent. Or, as stated in Trombley v. Anderson, 439 F.Supp. 1250, 1256 (E.D.Mich. 1977), affd. 584 F.2d 807 (6th Cir. 1978):

> "In United States v. Toney, 527 F.2d 716 (6th Cir. 1975) the court indicates the focal issue is whether or not the actions of defense counsel could have changed the verdict."

Petitioner submitted an affidavit to the trial court and the U.S. District Court that his attorney, Michael Friedman, advised Petitioner not to testify because his prior record would be used against him on cross-examination. (Appendix, A-16). Petitioner submits that it is ineffective assistance of counsel for an attorney to presume that prior convictions may be used against a defendant, without at least making a Motion to Suppress. Such a motion has long been recognized under Michigan law. People v. Jackson, 391 Mich. 323 (1974). However, no such motion was made.

Petitioner's prior convictions include a 1968 conviction for attempted breaking and entering, a 1973 conviction for felonious assault, and a 1973 conviction for attempted breaking and entering. The felonious assault conviction would have been especially harmful to Petitioner, who was accused here of making a deadly felonious assault.

Because a Motion to Suppress a prior record is made and heard outside the presence of the jury, the making of the motion cannot possibly bring harm to

the defendant, but can only help him. Any attorney with ordinary competence in the criminal law would make such a motion in this situation. Therefore, the failure to make such a motion constituted ineffective assistance of counsel.

More to the point, if counsel had attempted to suppress the conviction for felonious assault he may well have succeeded. See especially People v. Baldwin, 405 Mich. 550 (1979) [similarity of former crime to charged crime weighs against admissibility] and People v. Jackson, supra, adopting Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) [crime of violence has little relation to character trait of truthfulness]. In that case, Petitioner could have testified, and there may never have been a conviction.

Petitioner submits that to have the jury hear of a prior conviction for felonious assault (assault with a deadly weapon) would have been devastating in his attempt to show he did not commit the instant assault with a deadly weapon.

In this case, trial counsel should have moved to suppress before advising his client that he could be impeached with the prior record. His failure to do so was a dereliction of duty that prejudiced Defendant by keeping the jury from hearing his side of the story.

Because the state court conducted no hearings,

the federal court should have conducted a hearing before ruling on this issue.

The issue of under what circumstances an evidentiary hearing should be held is a question worthy of Supreme Court review. The issue of ineffective assistance of counsel is rooted in the particular facts of this case, but this case is nevertheless an appropriate vehicle for review.

Conclusion.

Petitioner Gregory Houston respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: September 20, 1988

No. 87-1605
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY HOUSTON,
Petitioner-Appellant

v.

DALE FOLTZ, Warden,
State Prison of Southern
Michigan, at Jackson,
Respondent-Appellee.
_____/

On Appeal from the
United States District
Court for the Eastern
District of Michigan.

Before: MARTIN, MILBURN and GUY, Circuit Judges.

PER CURIAM. Petitioner, Gregory Houston, appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Houston was convicted in state court of first-degree murder and assault with intent to murder. His conviction was affirmed by the Michigan Court of Appeals in a per curiam opinion on June 16, 1980. Petitioner's application for leave to appeal was denied by the Michigan Supreme Court.

Petitioner then filed an application for habeas corpus relief in federal court raising issues concerning the jury instructions, the effectiveness of

trial counsel, and the alleged misconduct of the prosecutor. The petition was denied. On appeal, we affirmed the district court's judgment on November 22, 1983. Houston v. Mintzes, 722 F.2d 290 (6th Cir. 1983).

Houston then returned to the state court and, with the aid of new counsel, filed for a new trial raising three new issues. The application was denied by the trial court and then subsequently denied by the Michigan Court of Appeals and the Michigan Supreme Court. Petitioner then filed the instant habeas petition raising the three issues presented before the state courts in his motion for a new trial.

Houston first argues that his due process rights were violated by a trial court evidentiary ruling excluding certain testimony. Petitioner next argues that the prosecution violated a discovery order and that this violation resulted in a new trial being granted to one of his co-defendants. Houston's final argument is that he was denied effective assistance of counsel.[1]

In the district court, Judge Pratt considered each of those arguments in a carefully written

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[1]The respondents argue below and on appeal that the merits of the issues argued by petitioner are not properly before the habeas court as there was never a ruling in the state courts on the merits. Although we agree that what occurred in the state courts is somewhat ambiguous, we prefer, as did Judge Pratt, to dispose of this case on the merits of the substantive issues raised.

opinion. Since we agree with the conclusions reached by Judge Pratt, we affirm on the basis of his opinion and write briefly for additional clarification.

I.

Houston was convicted of first-degree murder in the stabbing death of Kevin White. He was also convicted of assault with intent to murder Terrence Silver. Houston had been tried jointly with co-defendants Raleigh Lewis, Michael King, and Eddie Gavin, all of whom were also convicted of the assault on Silver. King was also convicted of manslaughter in connection with White's death.

On the night of the murder, Detroit police officer, James Kelly, was flagged down by an excited unidentified woman who informed Kelly that there had been a stabbing and the man who did the stabbing was running away. Kelly gave chase and apprehended Eddie Gavin. When the defense sought to introduce Kelly's testimony at trial, that portion relating to what the unidentified woman had told him was ruled inadmissible hearsay. Houston contends that it should have been construed as an "excited utterance" and admitted as an hearsay exception.[2]

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[2]The Michigan Rules of Evidence track the Federal Rules of Evidence in all particulars relevant to this issue. The Michigan Rules of Evidence had not yet been adopted at the time of this trial, but it is agreed that the Michigan "res gestae" exception to the hearsay rule would have been generally applicable and is the forerunner to the "excited utterance" exception.

Houston further claims prejudice since the testimony, if admitted, would have suggested that Gavin was the assailant.

There are several problems with this argument. First, even if it was erroneously excluded, "habeas review does not ordinarily extend to state court rulings on the admissibility of evidence." Fuson v. Jago, 773 F.2d 55, 59 (6th Cir. 1985), cert. denied, 106 S. Ct. 3334 (1986). It is only where an erroneous ruling deprives a petitioner of fundamental constitutional guarantees that a federal court will make inquiry on habeas review. Cooper v. Sowders, 837 F.2d 283, 286 (6th Cir. 1988); Walker v. Engle, 703 F.2d 959, 962 (6th Cir.), cert. denied, 464 U.S., 951 (1983). We find no error of constitutional magnitude here for a number of reasons. First, Houston claimed self-defense in the killing of White so that Gavin's alleged involvement is not really relevant. Second, the same testimony could have been elicited simply by asking officer Kelly who he chased and why he chased him. The testimony then is not hearsay at all but is the predicate for officer Kelly's actions. Third, Judge Pratt concluded the testimony was properly excluded as unreliable. Since officer Kelly only had a fleeting conversation with an unidentified woman and since there were two different stabbings, we conclude that a trial judge could have excluded this testimony as unreliable in

the proper exercise of his discretion.

II.

Houston argues that a pretrial statement of Silver should have been disclosed in advance of trial but was not disclosed until trial. He does not demonstrate how this was prejudicial to him, but argues that it is presumed to be prejudicial. This latter argument is predicated on People v. King, 98 Mich. App. 146, 296 N.W.2d 211 (1980), where the conviction of Houston's co-defendant King was reversed and the case remanded for a new trial. It is not clear from reading King whether there was more than one ground for the remand, but it is clear that the violation of a discovery order by the prosecutor was implicated. Unfortunately, the case contains no meaningful discussion of the discovery issue, nor does it even indicate whose statement was withheld. Furthermore, there is no way that one can conclude that what was deemed prejudicial to King would also be prejudicial to Houston. We note in this regard that, unlike King, Houston did not raise this issue in his direct appeal.

Furthermore, the statements relate to Silver's version of the attack made on Silver and do not involve the killing of White. Additionally, we are not bound to apply the same sanction for violation of a discovery order that a state court might. In habeas cases, the test is whether the concept of fundamental

fairness was violated and we are unable to conclude that such was the case here.

III.

Petitioner's ineffective assistance of counsel argument relates solely to the contention that his trial counsel should have moved to suppress evidence of Houston's previous extensive criminal record prior to advising him not to testify. Although it appears that if such a motion had been made one of the prior convictions might have been suppressed, the others would have been admissible. The Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), makes it clear that this is the kind of strategy decision by counsel that should not be second guessed by appellate courts. In addition, petitioner does not indicate how his testimony, if offered, would have changed the outcome of the case.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY HOUSTON,
Petitioner,

v.

CIVIL ACTION NO.
86CV-73199-DT
HONORABLE PHILIP PRATT

DALE FOLTZ,
Respondent.
_____/

MEMORANDUM OPINION AND ORDER

Petitioner, Gregory Houston, currently confined at the State Prison of Southern Michigan, has filed this application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted by a Detroit Recorder's Court jury on February 10, 1977, of first-degree murder and assault with intent to murder. People v. Houston, Docket No. 76-03793. He was sentenced to life imprisonment. His conviction was affirmed by the Michigan Court of Appeals in a per curiam opinion on June 16, 1980. People v. Houston, Docket No. 77-1607. Petitioner's application for leave to appeal was denied by the Michigan Supreme Court in a standard order dated May 19, 1981. People v. Houston, Docket No. 65383.

Petitioner then filed an application for habeas

corpus relief in this Court on August 11, 1981, raising issues concerning the jury instruction, the effectiveness of trial counsel, and the alleged misconduct of the prosecutor. The petition was denied on the merits by this Court in a Memorandum Opinion dated June 1, 1982. Civil Action No. 81-72872. The Sixth Circuit Court of Appeals affirmed this Court's judgment on November 22, 1983. Houston v. Mintzes, 722 F.2d 290 (6th Cir. 1983).

Petitioner then returned to the state appellate courts and, with the aid of counsel, filed a delayed application for leave to appeal in the Michigan Court of Appeals raising new claims. The application was denied in a standard order on November 26, 1984. Docket No. 80830. On November 25, 1985, the Michigan Supreme Court denied leave to appeal that decision. Docket No. 75592. Petitioner has now filed the instant habeas application raising the three claims presented before both state appellate courts in his delayed applications for leave to appeal. Petitioner, therefore, has adequately exhausted state court remedies before seeking federal habeas relief. Anderson v. Harless, 459 U.S. 4 (1982).[1]

---

[1]Respondent argues that state appellate review of the instant claims was barred because Petitioner did not raise the issues in his original state appeals. Respondent claims that absent a showing of "cause" for this procedural default and [footnote continued next page]

Petitioner first contends that the trial court violated due process of law by refusing to allow Petitioner to present relevant evidence that another person committed the crime. Petitioner was charged with premeditated murder in the death of Kevin White and with assault with intent to kill Terrence Silver.[2] Terrence Silver was the main prosecution witness.

The facts of this case are convoluted. Terrence Silver, Cheryl Holloway and Curtis Sheppard were walking to a store when they met Petitioner, Raleigh Lewis and Eddie Gavin. Tr. Tr. 222. Gavin told Sheppard that Petitioner wanted to speak to Terrence Silver's brother, Kevin White. Tr. Tr. 224. Ms. Holloway left the group and shortly returned with Mr. White. The two groups met; Petitioner

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[footnote continued from previous page]
"actual prejudice" resulting from the alleged errors, there can be no federal habeas review. Wainwright v. Sykes, 433 U.S. 72 (1977). This Court notes that Michigan has no recognized rule that limits the number of criminal appeals. Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986). Thus, the doctrine of cause and prejudice does not apply to the instant situation. Id. This Court will therefore address Petitioner's claims. This Court notes however, that this is Petitioner's second habeas application. Further piecemeal habeas litigation will not be condoned.

[2]Petitioner was charged along with Michael King in the murder of Kevin White. He was charged with co-defendants Raleigh Lewis and Eddie Gavin in the assault on Terrence Silver.

apparently displayed a knife. A scuffle ensued and Petitioner and White separated from the group. White was apparently holding a brick, Petitioner was holding a knife. Two attack dogs, owned by White's brother, Terrence Silver, were "let loose" on Petitioner. Tr. 240. Petitioner tried to stab the dogs, which were eventually called off by Silver. Tr. 549. Silver testified that Petitioner stabbed White immediately after the dogs were called off. Tr. 241. Cheryl Holloway testified that Petitioner swung his knife at White after the two begun to argue. Tr. 552. She apparently did not see White being stabbed. White ran away after he was wounded and Petitioner followed. Tr. 489-490. Petitioner then returned to the group, stated he wanted to kill White, and began to argue with Silver. Petitioner then stabbed Silver. Tr. 243. Kevin White subsequently died.

Detroit Police Officer James Kelly testified that he was "flagged down" by a woman as he was driving down East Jefferson. Tr. 686. Outside the presence of the jury, he explained that a man had been stabbed and that his attacker was running "north on Concord." Tr. 692-693. Officer Kelly followed the man and arrested him. The man was Eddie Gavin. As noted, Gavin was a co-defendant in the trial, charged in the assault on Terrence Silver but not in the murder of Kevin White. The trial court refused to admit the statement of the bystander, through the testimony of

the officer because it was hearsay. Petitioner, citing Chambers v. Mississippi, 410 U.S. 284 (1973), claims that this refusal violated his right to a fair trial.

In Chambers, supra, the petitioner was convicted of murdering a police officer. After his arrest, another man, Gable McDonald, gave a sworn confession that he had shot the officer. He later repudiated the confession and the repudiation was accepted by the Court. The evidence against the petitioner was not particularly strong and he defended that McDonald had committed the crime. In addition to the sworn confession, McDonald had also told three acquaintances that he had killed the officer. The trial court refused to allow the petitioner to call McDonald as an adverse witness and denied as hearsay the admission of testimony concerning McDonald's conversations admitting the crime.

The United States Supreme Court found there was sufficient indicia of reliability to admit the hearsay testimony concerning the confessions. Each was made spontaneously to an acquaintance, each was corroborated by the other confessions and McDonald's sworn (though repudiated) statement, and each was against McDonald's interest. The Court also noted that McDonald was available for cross-examination by the state. The Court ultimately held that the refusal to admit the testimony, in conjunction with the denial of the petitioner's request

to call McDonald as an adverse witness, amounted to a violation of the petitioner's due process right to present a defense.

The situation in the instant case does not amount to a due process violation. The declarant, an unknown woman, was unavailable for cross-examination. Likewise, there was no real independent corroboration for her identification of Gavin as the person who stabbed White. This Court finds the fact that her statement could be considered an "excited utterance" insufficient, in and of itself, to render the statement reliable. It should also be noted that there were a number of people involved in the incident who apparently ran away after the stabbing. In light of the evidence implicating Petitioner, any error in failing to admit the testimony did not amount to a federal due process violation. Cf. Chambers, supra.

Petitioner next claims that the prosecution withheld statements made by Terrence Silver from the defense prior to trial in violation of a pretrial discovery order. Petitioner apparently claims that this affected his ability to defend on the murder charge. This statement allegedly contradicted Silver's trial testimony. Petitioner, however, specifically states in his habeas application that the statement was produced at trial after Silver testified. See Habeas Application, pg. 13. Petitioner has failed to

show how the failure to obtain the statement prior to trial prejudiced the defense.

This Court notes that in any event, any error was harmless. The statement actually contradicted Silver's testimony at the preliminary examination. At the examination, Silver testified that a Vincent Hollis had been one of the people who attacked him. In the "withheld" statement, Silver apparently said that Hollis was not one of the attackers. The statement went to the assault on Silver and not to the murder of Kevin White. Thus, it was not "material" to Petitioner's defense of the murder charge. The "suppression" of the statement did not amount to a federal constitutional violation.

Petitioner last claims that he was denied the effective assistance of counsel because his defense attorney failed to make the "appropriate" motions at trial. He specifically contends that his attorney advised him not to testify because his prior convictions could be used to impeach him. Petitioner was convicted in 1968 of attempted breaking and entering, in 1973 of felonious assault, and again in 1973 of attempted breaking and entering. He claims that if counsel had filed a motion to suppress the convictions, they would have been held inadmissible and he could have testified at trial.

The standard for reviewing Sixth Amendment claims of ineffective assistance of counsel was set out

in Strickland v. Washington, 466 U.S. 668 (1984). A petitioner must first show that counsel's performance was deficient, i.e. that counsel was not acting as "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense so as to deprive the Petitioner of a fair trial. Id. Judicial scrutiny of a counsel's performance must be highly deferential. 466 U.S. at 689. Because of the difficulties of assessing counsel's performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is the [Petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689. Petitioner must show that there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceedings would have been different. 466 U.S. at 693-696.

Petitioner specifically admits in his habeas application that his prior attempted breaking and entering convictions would probably have been admissible for impeachment purposes. He correctly states, however, that the felonious assault conviction would not have been admissible. See People v. Baldwin, 405 Mich. 550 (1979) (similarity of former crime to charged crime weighs against admissibility); People v. Jackson, 391 Mich. 323 (1974) (crime of

violence has little relationship to question of truthfulness).

This Court finds that counsel was essentially correct in his assessment to the extent that two of Petitioner's three prior convictions could have been used at trial. In light of this, counsel did not act outside the realm of reasonable trial strategy in advising Petitioner not to testify. See Strickland, supra. Habeas relief is not warranted on this claim. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

PHILIP PRATT
CHIEF UNITED STATES DISTRICT JUDGE

DATED: May 29, 1987

AFFIDAVIT OF GREGORY HOUSTON

STATE OF MICHIGAN)
) SS.
COUNTY OF JACKSON)

Gregory Houston, being first duly sworn, does say and depose as follows:

1. I was the Defendant in People v Gregory Houston, Recorders Court Case No. 76-03793.

2. I did not testify at my trial.

3. The reason that I did not testify at my trial is that my lawyer told me that if I testified the prosecutor would be able to use my entire criminal record against me. If not for that advice I would have testified and told my side of the story.

4. I submitted an affidavit containing these facts and additional facts to the Detroit Recorders Court in 1984 for consideration on my Motion for New Trial.

GREGORY HOUSTON

Subscribed and sworn to before me this date: July 17, 1986

JOSEPH W. MOODY
Notary Public, Jackson County, Michigan
My commission expires May 26, 1987

88-588

No._____

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GREGORY HOUSTON

PETITIONER

VS.

DALE FOLTZ, Warden, State Prison
of Southern Michigan, at Jackson,

RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
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34 pp

QUESTIONS PRESENTED

I-II. WHERE PETITIONER CLAIMED SELF-DEFENSE, DID THE TRIAL COURT ERR IN EXCLUDING NONADMISSIBLE HEARSAY FROM AN UNKNOWN DECLARANT?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

III. WAS PETITIONER DENIED DUE PROCESS OF LAW WHERE CERTAIN PRETRIAL STATEMENTS OF A PROSECUTION WITNESS WERE NOT GIVEN HIS COUNSEL UNTIL DURING TRIAL, THE STATEMENTS DID NOT CONCERN THE GUILT OR INNOCENCE OF PETITIONER, NO OBJECTION WAS MADE TO THE PROCEDURE IN THE STATE COURT, AND A CODEFENDANT WHO TIMELY RAISED THE ISSUE RECEIVED A NEW TRIAL UPON APPEAL TO THE STATE COURT?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

IV. WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY DID NOT MAKE A PRETRIAL MOTION TO SUPPRESS PETITIONER'S PRIOR CONVICTIONS, YET ANALYSIS OF THE CONVICTIONS SHOWS MOST WOULD HAVE BEEN ADMISSIBLE, AND PETITIONER HAD NOT COMPLIED WITH THE STATE'S PROCEDURAL RULES REGARDING THE ISSUE OF INEFFEC- TIVE ASSISTANCE OF COUNSEL UNTIL EIGHT YEARS AFTER HIS CONVICTION?

The District Court said	"No"
Petitioner-Appellant says	"Yes"
Respondent-Appellee says	"No"
The Sixth Circuit Court of Appeals said	"No"

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STATEMENT OF THE CASE

A. STATEMENT OF PROCEEDINGS

Respondent-Appellee accepts the statement of proceedings given by Petitioner-Appellant, but would add the following to aid the Court:

Petitioner was charged along with codefendant King in the murder of Kevin White, and was charged with codefendants Lewis and Gavin in the assault on Terrence Silver.

Petitioner's appeal of right to the Michigan Court of Appeals raised the following issues: a) error of the trial court in denying a motion for directed verdict re: evidence of premeditation; b) denial of a fair trial because of comments made by the assistant prosecuting attorney during rebuttal.

The Michigan Court of Appeals allowed Petitioner to file a supplemental brief, through different counsel, and five issues were raised: a) insufficient evidence on the element of intent to kill, b) erroneous self-defense instruction, c) erroneous instruction as to Petitioner not testifying, d) insufficient evidence on intent to kill element in charge of assault with intent to murder, e) failure of trial counsel to object to erroneous instructions.

Although unpublished, the Michigan Court of Appeals opinion affirming Petitioner's convictions addressed each issue raised by Petitioner, and denied merit to them. By order dated May 19, 1981, Petitioner's application for leave to appeal to the Michigan Supreme Court was denied.

In August, 1981, Petitioner, through counsel, filed a petition for writ of habeas corpus in District Court. It was given the number 81-72872, and was denied by memorandum opinion and order dated June 1, 1982, authored by United States District Court Judge Philip Pratt. Six issues were raised in that petition: the instructional issues were first analyzed pursuant to the cause and prejudice standard, and were examined on the merits because the state Court of Appeals had looked beyond the fact that no objection had been made at trial. The claim of ineffective assistance of counsel was examined by Judge Pratt's opinion in the following perspective: "...A district court presented with a claim of ineffective assistance is required to review the full trial record and evaluate the 'total picture' rather than simply focus on particular errors or omissions

by counsel." United States v Yelardy, 567 F2d 863, 865 (6th Cir., 1978)." (Page 13 of Judge Pratt's memorandum opinion.) The last issue as to improper prosecutorial remarks in rebuttal was also denied merit. There was no mention in either the petition or the opinion of the reversal of the conviction of a codefendant by the state Court of Appeals in a published opinion, 98 Mich App 146 (1980) even though that case had been in existence for almost two years, having been issued on June 16, 1980.

Next, Petitioner filed, through new counsel, a Motion for Leave to File Motion for New Trial, in June, 1984, two years after the habeas petition was denied. That pleading asked the successor judge to consider the issues raised in this appeal. The trial court, however, by order entered in August, 1984, denied the motion for leave to file

motion for new trial, and thus, did not consider the merits of any of the claims raised in the pleading. (This point was made by Respondent in the response to the petition for writ of habeas corpus in District Court, and in the state courts after Petitioner appealed from the order denying leave to file delayed motion for new trial.)

By way of memorandum opinion and order denying the petition for writ of habeas corpus, District Court Judge Pratt addressed the issues raised now, and found them not sufficient to warrant habeas relief. (See opinion and order, appendix.)

B. STATEMENT OF FACTS

On the night of May 14-15, 1976, Terrence Silver and Vincent Hollis had a

disagreement regarding Hollis' girlfriend. Hollis threatened Silver and Silver hit Hollis (235-236).

On May 16, 1976, at 1:00 a.m., Silver was walking to a store in Detroit with Curtis (Duane) Sheppard, Cheryl Holloway (222), and two dogs. They were confronted by Gregory Houston, Eddie Gavin and Raleigh Lewis. Gavin asked Silver why he had hit Hollis; a short discussion followed. Holloway went to get Silver's brother and Houston began flashing a knife. Kevin White (Silver's brother) arrived and everything cooled down (231-232).

Silver, Sheppard, Holloway, White, and the dogs continued toward the store (232). When this group was about half-way into the next block, Houston, Gavin, and Lewis, plus Michael King (Hollis' brother) and Hollis came running

up to them (233-234). King had a shotgun (237).

Gavin indicated that Houston wanted to talk to White (234), apparently about a prior argument between Houston and White (236). King held the shotgun on Silver while Houston and White crossed the street. After an unknown conversation, Houston (with a knife) and White (with a brick) separated. Then Houston approached White and Silver's dogs attacked Houston (237). At King's orders, Silver called off the dogs (240-241). Houston again approached White and attempted to stab him, eventually succeeding (241). White started to run away and said he would be back but died shortly afterward (241-243).

Houston then returned to Silver and Silver asked Houston why he had stabbed

White (Silver's brother) (244). Houston indicated that he had planned to kill White for some time (244).

Detroit police officer Kelly testified that he was "flagged down" by a woman as he was driving down East Jefferson. (686). Outside the presence of the jury, he explained that the woman said that a man had been stabbed and that his attacker was running "north on Concord". (692-693). Kelly followed the man and arrested him. It was codefendant Eddie Gavin (who was later charged with assault with intent to kill Terrence Silver). Gavin was not charged in the murder of Kevin White. The trial court refused to admit the statement of the woman-bystander, elicited through the officer, because it was hearsay.

REASONS FOR DENYING THE WRIT

I-II. WHERE PETITIONER CLAIMED SELF-DEFENSE, THE TRIAL COURT DID NOT ERR IN EXCLUDING NONADMISSIBLE HEARSAY WHERE THE DECLARANT WAS UNKNOWN AND OTHER COMPETENT EVIDENCE ESTABLISHED PETITIONER'S GUILT.

No error occurred when the trial court would not allow a police officer to testify what an unknown witness said near the crime scene. (Petitioner's I.) Certainly in order to have that testimony admitted at trial, an exception to the hearsay rule would have to apply. Petitioner claims it was an excited utterance (res gestae statement).

MRE (Michigan Rule of Evidence) 803(2), in effect <u>after</u> this trial, defines excited utterance:

> "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

From the transcript excerpt presented by Petitioner, it seems the witness' statement was not an excited utterance: although there may have been a startling event (a stabbing), the statement gives no clue as to whether the woman saw it or when it happened. Because much other evidence confirmed that many people were involved, the woman's statement about one person is very suspect as to time.

The State cases cited by Petitioner do not exactly support his position. Todaro held, in relevant part, that no miscarriage of justice occurred when a police officer gave an unresponsive answer which included the comment of an unknown person "that is one of them"

(meaning defendant), and that statement was admitted at trial over objection, was not stricken, and was not the subject of a cautionary instruction.

There was no discussion in Todaro about spontaneous declaration or excited utterance re: that statement, although from the factual context presented, it was clearly an excited utterance.

As for the Johnson case, another proper example of an excited utterance was shown. A startling occasion - two men running down the street, statements given minutes after the event, and the statements related to the occurrence.

Because not enough evidence corroborated the needed foundation for an excited utterance herein, the trial court was within his discretion in keeping out that testimony.

It should be presumed that Petitioner was aware of this point at trial, since counsel made an issue of it and thus preserved it. Yet, as explained earlier, it was never raised until the very delayed motion in 1984, and then it was not addressed on the merits. Nonexcusable negligence exists on the record to support the Respondent's position. The issue should have been raised in the appeal of right in the state system, and in the first habeas petition in 1982. Failure to do so constitutes inexcusable neglect and intentional abandonment. See Moore v Zant, 734 F2d 585 (11th Cir. 1984); Witt v Wainwright, 755 F2d 1396 (11th Cir. 1985); Palmes v Dugger, 596 F supp 1433 (M.D. Fla. 1984); and see Woodard v Hutchins, 464 US 377, 104 S Ct 752, 78 L Ed2d 541 (1984).

Additionally, the statement at issue only concerned the witness's version of something defendant Gavin had done, and he was only charged with the assault on Silver, not the murder of White. Because there was not enough foundation shown to establish that the statement was an excited utterance, under states rules of evidence, the trial court did not err in excluding it. Further, there was other evidence which substantiated the charges against Petitioner. (Compare with Davis v Jabe, 824 F2d 483 (6th Cir. 1987), where harmless error was found in the exclusion of proffered testimony of the accused's brother.)

Lastly, as held by the District Court and the Sixth Circuit Court of Appeals "habeas review does not ordinarily extend to state court rulings on the admissibility of evidence". Fuson v Jago, 773 F2d 55, 59 (6th Cir. 1985),

cert. den, 106 S Ct 3334 (1986). Since there was no error of constitutional magnitude in the exclusion of the proffered evidence, (see page 4 of Sixth Circuit opinion), the state court's decision was a proper exercise of his discretion. See Cooper v Sowders, 837 F2d 284, 286 (6th Cir. 1988); Walker v Engle, 703 F2d 959, 962 (6th Cir. 1983), cert. den, 464 US 951.

III. DUE PROCESS WAS NOT DENIED PETITIONER WHERE THE STATEMENT AT ISSUE WAS GIVEN COUNSEL DURING TRIAL, NO OBJECTION WAS MADE AT TRIAL, THE STATEMENT DID NOT CONCERN THE GUILT OR INNOCENCE OF PETITIONER, AND THE ISSUE WAS NOT RAISED IN A TIMELY MANNER.

The discovery order issue, upon which reversal was predicated in King, (the codefendant), was never raised by this Petitioner until four years after the King case was published. This obvious delayed bootstrapping should not be condoned. Given that the same panel heard all appeals at the same time, they did not see fit to apply the "discovery order" issue to Petitioner Houston. This Court should also deny merit to the point.

Another analysis exists which supports a denial of merit for the issue. Because Petitioner presented a defense of self-defense, the discovery problem would not have altered his defense. That is, the jury would not have believed his defense more had the withheld statement been utilized. Thus, no reversible error occurred to Petitioner Houston. If error at all, it was harmless. People v Roberson, 55 Mich App 413, 416-417; 222 NW2d 761 (1974); People v Mobley, 390 Mich 57; 210 NW2d 327 (1973).

Next, Petitioner argues due process in requesting a new trial based on the King case. Due process generally means following a procedure to reap the benefits of the system which designed the procedure. No procedure was used by Petitioner here to get the benefit of a new trial except to wait four years after King was published. If the doctrine of

laches could be applied to criminal matters, this would be a prime example. Waiver of the issue also must be considered, since the issue existed at the time of trial and has not been raised until 1984.

Having held that a state rule of evidence, and the interpretation thereof, required exclusion of the requested testimony, the trial court properly exercised his discretion and control of the trial proceedings, in accordande with state law. MCL 768.29; MSA 28.1052; MCL 769.26; MSA 28.1096.

This was not like the situation in Elmore v Foltz, 768 F2d 773 (6th Cir. 1985) where certain tapes of conversation between the accused and an informant were destroyed, yet this Court found no denial of due process of law, given the factual context of the matter. In reaching that

conclusion, the Court pointed out that the material examined must be material and favorable to the accused before any colorable claim of error can be found. Here, the statement of witness Silver only went to impeachment of what he had said at the preliminary hearing about the presence of another person. It did not concern itself with the guilt of Defendant- Petitioner in the crimes charged. And it was not material to the self-defense theory presented by Petitioner.

As the United States Supreme Court stated in United States v Valuenzuela-Bernal, 458 US 858, 102 S Ct 3440, 73 L Ed2d 1193 (1982), when speaking to the notion of denial of due process of law:

> Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. 73 L Ed2d at 1205.

Even though the statement at issue here was not disclosed to Petitioner before trial, there can not be a claim of denial of due process now where the record shows that the statement was given counsel during trial, no objection to the issue was made, the statement did not inculpate or exculpate Petitioner, and it was not briefed until eight years after conviction. The act complained of did not "necessarily prevent a fair trial". United States v Valenzuela-Bernal, supra.

As the Sixth Circuit opinion recognized, concerning an issue like this, "the test is whether the concept of fundamental fairness was violated". (Opinion, page 5.) It was not.

IV. PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE HE DID NOT MAKE A MOTION TO SUPPRESS PRIOR CONVICTIONS, BUT CONCLUDED THAT TWO OF THE THREE PRIORS WOULD HAVE BEEN ADMISSIBLE, AND PETITIONER DID NOT COMPLY WITH THE STATE PROCEDURAL RULE ON THE ISSUE.

Petitioner's ultimate issue, one which appears too frequently in state appellate matters, claiming that trial counsel was ineffective in his representation since he failed to make a motion to suppress prior convictions, does not deserve review for several reasons: established state procedure on the issue requires a timely raising of the point, accompanied by a request for an evidentiary hearing, should the record

be deficient to support the claimed error; counsel correctly determined that most likely two of Petitioner's three prior convictions would be admissible (according to his affidavit filed post-conviction); and the point has not been presented for review on the merits to the state appellate courts, since the trial court, in 1984, denied the application for leave to file delayed motion for new trial and did not examine this issue, nor did the appellate courts. (See arguments, supra.)

With the case of People v Ginther, 390 Mich 436; 212 NW2d 922 (1973), the Michigan Supreme Court set forth the required procedure for those appellants who desire to perfect a claim of error from the issue of ineffective assistance of counsel, where the lower court record is deficient. The appealing party must seek an evidentiary hearing at the trial

court level to support the claim of ineffective assistance of counsel. Ginther, supra. The testimonial record in the lower court must exclude reasonable hypotheses consistent with adequate representation. Ginther, supra.

Concurrent with that requirement is the caveat dealt with earlier that the issue must be raised in a timely manner, and not casually brought forth years later for possible resolution. The doctrine of finality, wherein nonjurisdictional issues must be raised properly, People v Pauli, 138 Mich App 530, 533-534; 361 NW2d 359 (1984), and People v Brady, 139 Mich App 688, 691-693; 363 NW2d 8 (1984) controls. A claim of ineffective assistance of counsel is not a jurisdictional defect, and the record here shows that Petitioner recognized that by raising that claim (as

to other instances of conduct) in his 1982 petition for writ of habeas corpus. That he waited until 1984 to raise the current attack supports Respondent's position that the point should be considered waived. Habeas relief should be denied simply because of this procedural default. Wainwright v Sykes, 423 US 72, 97 S Ct 2497, 53 L Ed2d 594 (1977), and Maupin v Smith, 785 F2d 135, 138 (6th Cir. 1986).

Secondly, as Judge Pratt correctly noted, trial counsel was "essentially correct in his assessment to the extent that two of Petitioner's three prior convictions could have been used at trial". (See District Court opinion.) He did not act outside the realm of reasonable and competent trial strategy in representing Petitioner as he did; nor did he commit a serious mistake which can now be said to have affected the probable

outcome of the trial. Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984); People v Garcia, 398 Mich 250; 247 NW2d 547 (1976).

Finally, as analyzed in I. supra, there never was a review on the merits of this issue in the Michigan courts such that this Court should grant habeas review. Procedurally, Petitioner has double faulted, and, since this is not a tennis match, he gets no further serves. Maupin, supra. (Compare with the situation in Chandler v Jones, 813 F2d 773 (6th Cir. 1987) where this Court held Petitioner failed to show how counsel's deficient performance prejudiced the defense, even though specific deficiencies were found.)

RELIEF

WHEREFORE, Respondent requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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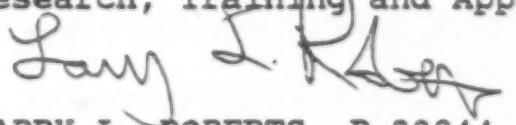

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LLR:jjh